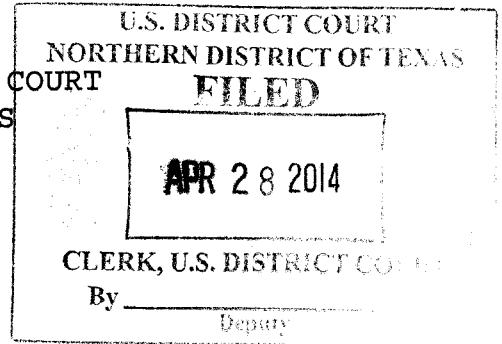


IN THE UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF TEXAS  
FORT WORTH DIVISION



DENNIS M. CLAPP,

Plaintiff,

VS.

WELLS FARGO, NATIONAL  
ASSOCIATION, AS TRUSTEE FOR  
CARRINGTON MORTGAGE LOAN TRUST,  
SERIES 2007-FRE1, ASSET-BACKED  
PASS-THROUGH CERTIFICATES,

Defendant .

25 26 27 28 29 30 31 32 33 34 35 36 37 38 39 40 41 42 43 44 45 46 47 48 49 50 51 52 53 54 55 56 57 58 59 60 61 62 63 64 65 66 67 68 69 70 71 72 73 74 75 76 77 78 79 80 81 82 83 84 85 86 87 88 89 90 91 92 93 94 95 96 97 98 99 100 101 102 103 104 105 106 107 108 109 110 111 112 113 114 115 116 117 118 119 120 121 122 123 124 125 126 127 128 129 130 131 132 133 134 135 136 137 138 139 140 141 142 143 144 145 146 147 148 149 150 151 152 153 154 155 156 157 158 159 160 161 162 163 164 165 166 167 168 169 170 171 172 173 174 175 176 177 178 179 180 181 182 183 184 185 186 187 188 189 190 191 192 193 194 195 196 197 198 199 200 201 202 203 204 205 206 207 208 209 210 211 212 213 214 215 216 217 218 219 220 221 222 223 224 225 226 227 228 229 230 231 232 233 234 235 236 237 238 239 240 241 242 243 244 245 246 247 248 249 250 251 252 253 254 255 256 257 258 259 260 261 262 263 264 265 266 267 268 269 270 271 272 273 274 275 276 277 278 279 280 281 282 283 284 285 286 287 288 289 290 291 292 293 294 295 296 297 298 299 300 301 302 303 304 305 306 307 308 309 310 311 312 313 314 315 316 317 318 319 320 321 322 323 324 325 326 327 328 329 330 331 332 333 334 335 336 337 338 339 340 341 342 343 344 345 346 347 348 349 350 351 352 353 354 355 356 357 358 359 360 361 362 363 364 365 366 367 368 369 370 371 372 373 374 375 376 377 378 379 380 381 382 383 384 385 386 387 388 389 390 391 392 393 394 395 396 397 398 399 400 401 402 403 404 405 406 407 408 409 410 411 412 413 414 415 416 417 418 419 420 421 422 423 424 425 426 427 428 429 430 431 432 433 434 435 436 437 438 439 440 441 442 443 444 445 446 447 448 449 450 451 452 453 454 455 456 457 458 459 460 461 462 463 464 465 466 467 468 469 470 471 472 473 474 475 476 477 478 479 480 481 482 483 484 485 486 487 488 489 490 491 492 493 494 495 496 497 498 499 500 501 502 503 504 505 506 507 508 509 510 511 512 513 514 515 516 517 518 519 520 521 522 523 524 525 526 527 528 529 530 531 532 533 534 535 536 537 538 539 540 541 542 543 544 545 546 547 548 549 550 551 552 553 554 555 556 557 558 559 560 561 562 563 564 565 566 567 568 569 570 571 572 573 574 575 576 577 578 579 580 581 582 583 584 585 586 587 588 589 590 591 592 593 594 595 596 597 598 599 600 601 602 603 604 605 606 607 608 609 610 611 612 613 614 615 616 617 618 619 620 621 622 623 624 625 626 627 628 629 630 631 632 633 634 635 636 637 638 639 640 641 642 643 644 645 646 647 648 649 650 651 652 653 654 655 656 657 658 659 660 661 662 663 664 665 666 667 668 669 670 671 672 673 674 675 676 677 678 679 680 681 682 683 684 685 686 687 688 689 690 691 692 693 694 695 696 697 698 699 700 701 702 703 704 705 706 707 708 709 710 711 712 713 714 715 716 717 718 719 720 721 722 723 724 725 726 727 728 729 730 731 732 733 734 735 736 737 738 739 740 741 742 743 744 745 746 747 748 749 750 751 752 753 754 755 756 757 758 759 760 761 762 763 764 765 766 767 768 769 770 771 772 773 774 775 776 777 778 779 780 781 782 783 784 785 786 787 788 789 790 791 792 793 794 795 796 797 798 799 800 801 802 803 804 805 806 807 808 809 810 811 812 813 814 815 816 817 818 819 820 821 822 823 824 825 826 827 828 829 830 831 832 833 834 835 836 837 838 839 840 841 842 843 844 845 846 847 848 849 850 851 852 853 854 855 856 857 858 859 860 861 862 863 864 865 866 867 868 869 870 871 872 873 874 875 876 877 878 879 880 881 882 883 884 885 886 887 888 889 890 891 892 893 894 895 896 897 898 899 900 901 902 903 904 905 906 907 908 909 910 911 912 913 914 915 916 917 918 919 920 921 922 923 924 925 926 927 928 929 930 931 932 933 934 935 936 937 938 939 940 941 942 943 944 945 946 947 948 949 950 951 952 953 954 955 956 957 958 959 960 961 962 963 964 965 966 967 968 969 970 971 972 973 974 975 976 977 978 979 980 981 982 983 984 985 986 987 988 989 990 991 992 993 994 995 996 997 998 999 1000 1001 1002 1003 1004 1005 1006 1007 1008 1009 1010 1011 1012 1013 1014 1015 1016 1017 1018 1019 1020 1021 1022 1023 1024 1025 1026 1027 1028 1029 1030 1031 1032 1033 1034 1035 1036 1037 1038 1039 1040 1041 1042 1043 1044 1045 1046 1047 1048 1049 1050 1051 1052 1053

NO. 4:14-CV-035-A

MEMORANDUM OPINION

and

ORDER

Before the court for decision is the motion to dismiss pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, filed in the above action by defendant, Wells Fargo, National Association, as Trustee for Carrington Mortgage Loan Trust, Series 2007-FRE1, Asset-Backed Pass-Through Certificates, Plaintiff, Dennis M. Clapp, filed a response, and defendant filed a reply. Having now considered all of the parties' filings, plaintiff's first amended complaint, and the applicable legal authorities, the court concludes that the motion should be granted.

I.

Background and Plaintiff's Pleaded Claims

Plaintiff initiated this action by filing his original petition in the District Court of Tarrant County, Texas, 141st Judicial District. Following removal, the court ordered plaintiff to file an amended complaint that complied with the requirements of the Federal Rules of Civil Procedure, as interpreted by the United States Supreme Court in Ashcroft v. Iqbal, 556 U.S. 662 (2009), and Bell Atlantic Corp. v. Twombly, 550 U.S. 544 (2007). Plaintiff then filed his first amended complaint, in which he alleged the following:

On or about November 10, 2006, plaintiff signed a "Texas Home Equity Note" and a "Texas Home Equity Security Instrument" to refinance a previous loan made for the purchase of property in Kennedale, Tarrant County, Texas. The loan amount was \$235,000.00, and named as lender Fremont Investment & Loan.

At some point, plaintiff requested loan assistance from defendant due to financial difficulties he faced as a result of health issues. Plaintiff submitted the requested information, but defendant misplaced the documents, requiring plaintiff to resubmit them. Defendant has not yet informed plaintiff if the loan modification has been approved or denied. Because defendant has neither approved nor denied the modification, plaintiff was

deprived of his right to appeal defendant's decision, and he did not know he "needed to make other plans regarding [his] loan and residence." Id. at 4. Although the deed of trust affords plaintiff an opportunity to reinstate his loan, defendant denied plaintiff this right by not informing him that the loan modification had been denied.

Defendant posted the property for foreclosure sale on January 7, 2014. The notice of substitute trustee's sale identifies defendant as the current mortgagor; however, the public records of Tarrant County, Texas, do not reflect any assignment, transfer, or conveyance of the deed of trust. Accordingly, plaintiff questions whether defendant had authority to conduct such a sale.

Plaintiff in the first amended complaint challenged defendant's authority to foreclose, and alleged a single claim for breach of contract, that included a purported violation of the duty of good faith and fair dealing. Plaintiff also sought injunctive relief to bar any transfer of his property.

## II.

### Standards Applicable to Motion to Dismiss

Rule 8(a)(2) of the Federal Rules of Civil Procedure provides, in a general way, the applicable standard of pleading. It requires that a complaint contain "a short and plain statement

of the claim showing that the pleader is entitled to relief," Fed. R. Civ. P. 8(a)(2), "in order to give the defendant fair notice of what the claim is and the grounds upon which it rests." Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555 (2007) (internal quotation marks and ellipsis omitted). Although a complaint need not contain detailed factual allegations, the "showing" contemplated by Rule 8 requires the plaintiff to do more than simply allege legal conclusions or recite the elements of a cause of action. Id. at 555 & n.3. Thus, while a court must accept all of the factual allegations in the complaint as true, it need not credit bare legal conclusions that are unsupported by any factual underpinnings. See Ashcroft v. Iqbal, 556 U.S. 662, 679 (2009) ("While legal conclusions can provide the framework of a complaint, they must be supported by factual allegations.")

Moreover, to survive a motion to dismiss for failure to state a claim under Rule 12(b)(6), the facts pleaded must allow the court to infer that the plaintiff's right to relief is plausible. Id. at 678. To allege a plausible right to relief, the facts pleaded must suggest liability; allegations that are merely consistent with unlawful conduct are insufficient. Twombly, 550 U.S. at 566-69. "Determining whether a complaint states a plausible claim for relief . . . [is] a context-specific task that requires the reviewing court to draw on its judicial

experience and common sense." Iqbal, 556 U.S. at 679. In adjudicating a motion to dismiss, the court may consider the complaint, its attachments, and documents that are referred to in the complaint and central to the plaintiff's claims. Collins v. Morgan Stanley Dean Witter, 224 F.3d 496, 498-99 (5th Cir. 2000).

### III.

#### Application of Law to Facts

##### A. Authority to Foreclose

It is unclear from the first amended complaint if plaintiff is attempting to assert a cause of action for lack of authority to foreclose, or if he simply raised the possible lack of authority as a side issue. Tackling the issue head-on, defendant included in its appendix in support of the motion to dismiss a copy of the note, deed of trust, and assignment to defendant. Defendant asks that the court take judicial notice of these documents, as they are matters of public record, all being previously recorded in the records of the Tarrant County Clerk.

The court agrees, and takes judicial notice of the documents as public records. See Tellabs, Inc. v. Makor Issues & Rights, Ltd., 551 U.S. 308, 323 (2007) (in considering a motion to dismiss under Rule 12(b)(6), the court must consider the complaint in its entirety, as well as "matter of which a court may take judicial notice."). Whatever issue plaintiff attempted

to raise by challenging the assignment is moot.

B. Plaintiff's Breach of Contract Claim is Dismissed

The basis of plaintiff's breach of contract claims appears to be that defendant offered, and plaintiff accepted, a "loan modification review." Pl.'s First Am. Compl. at 5-6. Plaintiff contended that he "tendered performance and relied on Defendant's representations and promises, to his detriment," id. at 6, which constituted a unilateral contract. Defendant allegedly breached the unilateral contract because it has placed plaintiff in a situation where he is unable to catch up on his payments and may lose his home.

Defendant advanced two arguments for dismissal of plaintiff's breach of contract claim: (1) plaintiff failed to allege his own performance; and, (2) plaintiff's claim is foreclosed by the statute of frauds.

To sustain a breach of contract action under Texas law requires plaintiff to show: (1) the existence of a valid contract; (2) plaintiff performed or tendered performance under the contract; (3) breach by defendant; and, (4) the breach damaged plaintiff. Mullins v. TestAmerica, Inc., 564 F.3d 386, 418 (5th Cir. 2009) (citation omitted). It is well-settled that "a party to a contract who is himself in default cannot maintain a suit for its breach." Dobbins v. Redden, 785 S.W.2d 377, 378

(Tex. 1990) (per curiam) (citation omitted).

Here, it appears that the first amended complaint alleged only that plaintiff tendered performance by submitting documents requested by defendant for a loan modification review. As noted in defendant's motion, plaintiff did not allege that he performed under the note and deed of trust by making the required payments. Rather than deny this contention in his response, plaintiff tacitly admitted its truth by claiming he was waiting on defendant's decision as to his possible loan modification. Nowhere does plaintiff allege that the note or deed of trust permitted cessation of plaintiff's payment obligations thereunder during the pendency of a loan modification review. Additionally, plaintiff in the first amended complaint admitted that his loan is in arrears.<sup>1</sup> Because plaintiff breached the note and deed of trust, he cannot sustain a breach of contract claim against defendant. Id.; see also Williams v. Wells Fargo Bank, N.A., \_\_\_ F. App'x \_\_\_, No. 13-10233, 2014 WL 1044304 at \*4 (5th Cir. Mar. 19, 2014) (per curiam) ("[I]f, as here, plaintiffs fail to allege they were current on their payments under the deed of trust,

---

<sup>1</sup>In admitting this fact, plaintiff attempted to place blame on defendant by attributing the arrearage to defendant's "run around games and stall tactics." Pl.'s First Am. Compl. at 6. Plaintiff did not elaborate on what those "games" and "tactics" were or how they caused him to be in arrears on his payments under the note. Plaintiff also did not allege that defendant promised to modify his loan, only that defendant offered to review the loan for a possible modification, and he provided no facts to show how defendant's review caused his loan to be in arrears.

dismissal of their breach of contract claim is proper." ).<sup>2</sup>

The court has also considered defendant's argument that the breach of contract claim is barred by the statute of frauds, and finds that dismissal would be warranted on this ground as well. However, inasmuch as the court has dismissed the breach of contract claim on other grounds, it need not devote time to a discussion of the statute of frauds argument.

Also as part of his breach of contract claim, plaintiff contends that defendant breached an implied duty of good faith and fair dealing likewise fails. Relying on sections 1.201(20) and 9.102(c) of the Texas Business and Commerce Code, plaintiff contends that under the Texas Uniform Commercial Code ("UCC"), a duty "of good faith and fair dealing is included in the performance of every contract."<sup>3</sup> Pl.'s First Am. Compl. at 6. Plaintiff alleged that his "mortgage note is a negotiable instrument governed by the Uniform Commercial Code," and that the "Uniform Commercial Code provides that every contract or duty imposes an obligation of good faith in its performance and enforcement." Id. (quoting section 1.304 of the Texas UCC).

---

<sup>2</sup>The court recognizes that this unpublished case is not binding precedent, but finds its holding instructive in this action.

<sup>3</sup>Plaintiff cited to the case of Belyea v. Litton Loan Servicing, LLP, Civil Action No. 10-10931-DJC, 2011 WL 2884964 (D. Mass. July 15, 2011), to support this proposition. Plaintiff did not, however, attempt to explain how a case from the district court of Massachusetts, interpreting Massachusetts law, supports his claim for violation of a duty he contends is imposed by Texas law.



Plaintiff's reliance on the UCC is misplaced. Section 1.201(20) of the UCC defines "good faith" as "honesty in fact and the observance of reasonable commercial standards of fair dealing." Section 9.102(c) merely states that "[c]hapter 1 contains general definitions and principles of construction throughout this chapter." Neither of these sections imposes any duty on, nor supports a cause of action against, defendant. And, section 9.109(d)(11) provides that chapter nine of the UCC does not apply to "the creation or transfer of an interest in or lien on real property."

Plaintiff also relies on section 1.304 of the UCC, which imposes an obligation of good faith on "[e]very contract or duty within this title." Tex. Bus. & Com. Code Ann. § 1.304 (emphasis added). However, contrary to plaintiff's assertions, a mortgage note is not "within" the UCC: "[b]ecause the Deed of Trust places a lien on real property, it is not governed by the UCC." Vogel v. Travelers Indem. Co., 966 S.W.2d 748, 753 (Tex. App.--San Antonio 1998, no pet.) (emphasis in original). The comments to section three of the UCC, concerning negotiable instruments, also could not be more clear: "Article 3 is not meant to apply to contracts for . . . the sale or lease of real property or similar writings that may contain a promise to pay money." Tex. Bus. &

Com. Code § 3.104, Cmt. 2.<sup>4</sup> Additionally, Texas courts generally do not impose a duty of good faith and fair dealing in the mortgagor/mortgagee relationship. See, e.g., FDIC v. Coleman, 795 S.W.2d 706, 709 (Tex. 1990).

The sum of the foregoing is that the first amended complaint fails to state a claim against defendant for breach of the duty of good faith and fair dealing.

C. Injunctive Relief

Defendant argued for dismissal of plaintiff's request for injunctive relief on the ground that, if the court dismisses all of plaintiff's other claims and causes of action, nothing remains to support such a request. Because plaintiff has failed to show a plausible right to relief on any of his claims, he is entitled to no injunctive relief.

D. Plaintiff's Request to Amend Complaint

In the conclusion of his response, plaintiff asks that he be permitted to replead, should the court determine any of his claims are deficient. Rule LR 10.1(a) of the Local Civil Rules of the United States District Court for the Northern District of

---

<sup>4</sup>"The UCC official commentary is an authoritative interpretation of the Code." Jones v. Wells Fargo Bank, N.A., 666 F.3d 955, 960 n.5 (5th Cir. 2012). Texas courts consider the comments as providing valuable guidance pertaining to the meaning and purpose of the Texas UCC. Id. "Barring a contrary interpretation from the Texas courts," the court is guided by the official commentary. Id.

Texas requires that "each . . . motion, or other paper must: (a) contain on its face a title clearly identifying each included pleading, motion, or other paper; . . . ." The response to the motion to dismiss does not indicate on its face that it includes a motion to amend. Nor did plaintiff inform the court of the additional facts he could plead to correct the deficiencies in the first amended complaint, and he did not attach to the response a proposed second amended complaint. Under these circumstances, the court is not permitting plaintiff to replead. Sullivan v. Leor Energy, LLC, 600 F.3d 542, 551 (5th Cir. 2010).

Additionally, the first amended complaint represents plaintiff's second pleading in this action. Plaintiff filed his original petition in the state court. Upon removal, the court entered an order that described the pleading standards required by the Federal Rules of Civil Procedure, as interpreted by Twombly and Iqbal, and ordered plaintiff to file an amended complaint consistent with those standards. Plaintiff then filed his first amended complaint. Plaintiff has thus been provided ample opportunity to correct any deficiencies in his pleadings, and the court can see nothing to be gained by allowing another amended complaint.

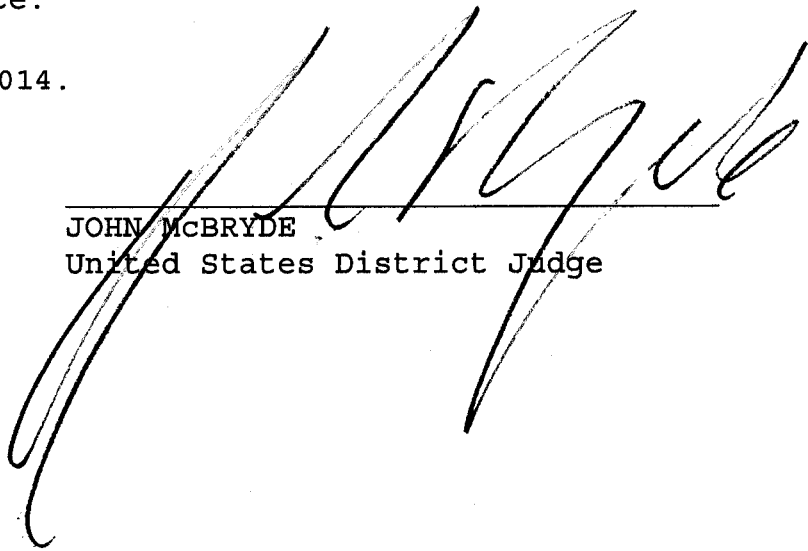
IV.

Order

Therefore,

The court ORDERS that defendant's motion to dismiss be, and is hereby, granted, and that all claims and causes of action asserted in the above-captioned action by plaintiff, Dennis M. Clapp, against defendant, Wells Fargo, National Association, as Trustee for Carrington Mortgage Loan Trust, Series 2007-FRE1, Asset-Backed Pass-Through Certificates, be, and are hereby, dismissed with prejudice.

SIGNED April 28, 2014.



JOHN MCBRYDE  
United States District Judge